In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1202

A. L., PETITIONER,

v.

G. R. H., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO.

A.L., PETITIONER,

v.

G.R.H., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

The petitioner, A.L., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Indiana entered in this proceedings on April 16, 1975.

Opinion Below

The opinion of the Court of Appeals of Indiana, printed in the Appendix hereto, *infra*, p. A1, is reported in 325 N. E. 2d 501.

Jurisdiction

The judgment of the court of Appeals of Indiana was entered on April 16, 1975, a timely petition for rehearing was denied on May 29, 1975, (Appendix B). A timely petition to transfer the cause to the Supreme Court of Indiana was denied on December 5, 1975, (Appendix C). The Supreme Court of Indiana is the highest court in that state having jurisdiction to review decisions of lower state courts. Indiana Rules of Appellate Procedure, Rule AP 11 (B). This petition for certiorari was filed within ninety (90) days of the Indiana

Supreme Court's refusal to review, or "transfer", the decision herein. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

Question Presented

Does the mother, and sole natural guardian, of a retarded child, have a constitutional right to have that child sterilized?

Constitutional Provisions Involved

The Constitution of the United State provides:

First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

Ninth Amendment:

"The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

Fourteenth Amendment, §1:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property,

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without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

The petitioner filed an action for a declaratory judgment in the Vanderburgh Superior Court, a local Indiana court of general jurisdiction, against her minor child. She alleged that the whereabouts of his father were unknown; that her child had suffered irreversible brain damage and although fifteen years old, had the mentality of a nine year old; that he is being educated in a special education class with retarded children; that the father of this child had suffered mental disability; that her child will never be able to support himself; that he is becoming sexually aware; that he associates with other retarded children and that she desires to have him surgically sterilized.

The trial court appointed a guardian ad litem for the child, who filed an answer denying the essential allegations of the complaint.

The mother filed a reply, asserting her right to have her child sterilized. The relevant parts of that reply read:

"* * *

1. That she is the natural mother and parent of the defendant herein and she has the right to rear and control her defendant child as she deems to be in his best interests. That she, pursuant to her natural right as parent, and the following Constitutional rights, has the right to have said child sterilized, her Constitutional right deriving from the following:

* * *

Constitution of the United States, the 9th, 10th and 14th Amendments thereof.

* * *".

This reply was disposed of by the adverse ruling on the trial of the cause.

On the trial of the cause, the following facts were adduced:

Petitioner's Evidence

The petitioner testified:

The defendant, Gary, is my son and he is fifteen. He is in my custody. His father was a homosexual and an alcoholic and I left him. I don't know where he is. Gary was hit by a car seven years ago. He has brain damage - he was unconscious for three and a half months. His mental capability is the same as our ten year old. He is in a special education class, generally for mentally retarded or handicapped children. He generally associates with five, six, seven or ten year olds. Gary's father was hospitalized in the Evansville State Hospital for mental illness. Recently, Gary has been wanting to date girls. He has said that he felt warm all over after he kissed a girl. When he sees a girl in shorts or swimsuits on television, he makes remarks and whistles. He is entering puberty. He has been dating girls from his special education class. I've asked that Gary be put on a waiting list, at "Rehab", for a summer job. Gary's intelligence is that of a ten year old. In my opinion there is no kind of gainful employment he could do. He is not improving. I saw a physician, wanting a vasectomy for Gary. He said he would do it, and even set a date. He then conferred with his attorneys, and the physician refused to do it. I want a declaratory judgment giving me the right to have the operation performed. I have thought about it for one year.

Dr. Dyer (the physician I saw) said that if Gary marrid a normal child he would have normal children, but if he married a classmate, they would have retarded children. Gary had a tutor for a year, and then, after making D+'s and F's in school, was placed in special education. His grades have improved, but his intellect has not.

He is wanting to date girls now. He's always wanting to put his arm around them, kiss them. He's fast - he doesn't care who's there. Once he had a girl in the living room. I went in there pretending to straighten up, so I could be with

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them. He chased me to the kitchen and the girl got mad and left. I asked him what happened and he just smiled. She was eleven or twelve years old and in the special education class. Gary told me it didn't made any difference if he had children or not.

Every doctor and the lady from Rehab have told me it would be hard for Gary to get a job. I want a vasectomy performed on Gary because I don't think he would be able to take care of children. It's not just my idea. I've had doctors and everybody tell me that. I took Gary to Dr. Fisher before he died. He was the psychiatrist who was taking care of Gray when his brain was damaged. I think he'll find it very difficult to support a child and I don't want him to impregnate anyone.

Dr. Wallace Dyer gave this written evidence (verbatim):

"* * * 'It is my feeling that a vasectomy would be of considerable benefit due to the fact that his intelligence and capabilities are quite limited, and he is easily led, which could pose some severe problems sexually in the near future.' * * *"

Respondent's Evidence

Spiro Mitsos testified:

I am a psychologist and director of the Rehabilitation Center. I performed a psychological evaluation of Gary recently. I found him typical of youngsters with residuals of head injury. He's doing remarkably well. He is entirely clear between what is real and what is fantasy. I think it's realistic that he wants to stay in special education and get a job. We know Gary has suffered a serious (brain) injury. Although he has a lot of capability, he's impulsive, has poor memory, poor concentration, but is learning. I found him relatively free of anything that would approximate mental illness, other than the impulsiveness. He will continue to learn basic skills. Although this is purely conjecture, he will learn better ways of controlling his impulsivity. In terms of a long range forecast, it's difficult to say. Many people in our society are functioning independently at no higher level

than Gary. Certain jobs would be in Gary's grasp - community sheltered workshops and entry level jobs - minimum wage jobs. I believe Gary has sufficient intelligence that he should be consulted about (the vasectomy). When Gary was tested two years ago, his IQ was 65, normal is 90 to 110. It can improve or deteriorate. Gary will always function below the normal range. Right now Gary is still very much a little boy. It would be difficult to conceive of him assuming responsibility of marriage, but he's just going into adolescence. My summary impressions also include: It would appear unlikely that he would initiate anti-social behavior, but because of his limitations he could be led into it. That could include impregnating a girl. I can conceive of the possiblity of Gary functioning as a husband and father, given further development.

Durwood Johnson testified:

I am chief psychologist employed at the Rehabilitation Center. I examined Gary. I gave him tests. There was improvement from the tests given him two years ago. His IQ was now 83. I believe Gary can develop to a stage where he could hold a job. He should be permitted to make this decision (concerning vasectomy) when he has obtained his maximum ability to make judgments. Generally, people gravitate to people who are functioning about as they are.

On August 10, 1973, the trial court granted judgment to the respondent-son.

Thereafter, the petitioner-mother filed a motion to correct errors. The relevant parts of the grounds for said motion follow:

"* * *

1. The undisputed evidence shows that the plaintiff is the natural mother of defendant, that she has his custody and control, and the whereabouts of defendant's father are unknown.

2. That the undisputed evidence shows that defendant is mentally deficient.

3. That by virtue of natural, statutory and case law,

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and the following constitutional provisions:

* * *

Constitution of the United States, 1st, 9th, 10th and 14th Amendements.

plaintiff has not only the right, but a positive duty to:

(a) Provide for the medical needs of defendant; take such steps as she deems necessary to correct any physical, mental or emotional defects which he may have; and secure medical and surgical assistance to protect his well-being in every aspect of his life,

(b) Prevent defendant from becoming delinquent, committing crimes or torts, or engaging in any sort of anti-social behavior.

4. That by virtue of the same authorities, plaintiff has the right:

(a) To rear her child in any manner she sees fit, so long as she violates no laws in the process,

(b) To prevent defendant from fathering mentally deficient children, who will become her dependents,

(c) To avoid financial responsiblity for *any* children of defendant's born out of, or in, wedlock,

(d) To, in her own right, and as a member of the local, national, and world communities, prevent the procreation of children who are likely to engage in delinquent, tortious or criminal conduct to the detriment of plaintiff and those communities."

This motion was overruled and petitioner prosecuted her appeal to the Indiana Court of Appeals.

Reasons For Granting The Writ

The Indiana State Court Has Decided Federal Questions of Substance not Theretofore Determined by this Court.

This Court has held, in *Ginsberg v. New York*, 390 U. S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968):

> "* * * constitutional intrepretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. * * *"

To this same effect are *Stanley v. Illinois*, 405 U. S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); and *Prince v. Massachusetts*, 321 U. S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944).

These parental rights apparently derive *(inter alia)* from the Ninth and Tenth Amendments to the Constitution of the United States. To more specifically define parental rights we look to the general body of common law in the United States.

> "* * * It is said that the parental authority should be so far supreme that whatever would unduly impair it should be foregone by the child for his ultimate good. * * *"
>
> 59 Am. Jur. 2d, *Parent and Child*, §8, p. 90.

General parental duty has been defined as an obligation to do whatever is necessary for the care, maintenance and preservation of the child. 59 Am. Jr. 2d, *Parent and Child*, §14, p. 97. Moving more specifically to the area in question, it has been held that parental duty, "requires that parents shall protect their children from the consequences of their own weakness and ignorance." *Com v. Stewart*, 12 Pa. Co. Ct. 151, 2 Pa. Dist. R. 43, 36 A.L.R. 866, 869 (1879).

It has been decided, that upon the question of surgical need for children, the will of the parents is controlling, and the child's wishes or consent are totally irrelevant. *Weston v. Hospital of St. Vincent*, 131 Va. 587, 107 S. E. 785, 786, (1921); *Friedrichsen v. Niemotka*, 71 N. J. Super 398, 177 A. 2d 58, 60, (1962).

In Indiana, if a parent contributes to the neglect of a child, that parent runs afoul of the Juvenile Code, I. C.

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1971, 31-5-5-4 (Ind. Ann. Stat. §9-2809). What if the respondent were to father an illegitimate child? Although petitioner can find no specific authority, by analogy to tort law, she may be liable. See 59 Am. Jur. 2d, *Parent and Child*, §134, p. 235.

The mother also asserts First Amendment rights to rear her child as her conscience directs her to do. She finds no supporting authority. However, closely analagous to that right are her rights grounded in "natural" law, buttressed by the Ninth and Tenth Amendments. These rights have undergone limited evolution but remain virtually intact. It might be observed that what we call natural law is grounded, at least in part, upon Judaeo-Christian teachings. Those teachings make the right of the parent paramount. Consider God's instruction to Abraham, found in Genesis, 22:2:

> "And he said, Take now thy son, thine only son Isaac, whom thous lovest, and get thee into the land of Moriah; and offer him there for a burnt offering upon one of the mountains which I will tell thee of."

Abraham was relived of this onerous duty, but as time passed the parent's right still predominated. Colossians, 3:20 says:

> "Children, obey your parents in all things for this is well pleasing unto the Lord."

The mother does not quote these passages as proof of her moral correctness, but rather to show some basis for the natural law that she, in part, relies upon.

Is what the mother proposes to do foreign to Anglo-Saxon jurisprudence? A statute permitting sterilization of mental patients was declared to be constitutional in the celebrated case of *Buck v. Bell* 274 U. S. 200, 47 S. Ct. 584, 71 L. Ed. 1000, (1927).

That case involved a statute, and the case at bar does not. However, again by analogy it is useful and relevant to

analyze the attitudes of American courts towards sterilization statutes. These have been held constitutional in the following cases: *State v. Schaffer*, 126 Kan. 607, 270 p. 604, (1928); *Smith v. Command*, 231 Mich. 409, 204 N. W. 140, (1925); *In Re Clayton*, 120 Nebr. 680, 234 N. W. 630, (1931); *State v. Troutman*, 50 Idaho 673, 299 P. 668, (1931); *In Re Main*, 162 Okl. 65, 19 P. 2d 153, (1933); *Davis v. Walton*, 74 Utah 80, 276 P. 921, (1929); *In Re Cavitt*, 182 Nebr. 712, 157 N. W. 2d 171, (1968) opinion adhered to 183 Nebr. 243, 159 N. W. 2d 566, app. dism. 396 U. S. 996, 90 S. Ct. 543, 24 L. Ed 2d 490, (1970); *Cook v. State*, ____ Or. App. ____, 495, P. 2d 768, (1972).

There is other case law on sterilization. In the apparently *nisi pruis* decision of *In Re Simpson*, Probate Court of Zanesville County, Ohio, 180 N. E. 2d 207 (1962), the court construed a general probate statute, not even mentioning sterilization, as authority to do so under conditions remarkably similar to those at bar. *Christenson v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934) holds there is no public policy against sterilization for medical reasons. *Custodio v. Bauer*, 59 Cal. Rptr. 463, 251 C.A. 2d 303, 27 A.L.R. 3d 884, 897, (1967) says that where sterilization is not prohibited by statute, "the matter would appear to be one of individual conscience." The case cites a number of authorities holding sterlization is not against public policy. In accord is *Jessin v. Shasta County*, 79 Cal. Rptr. 359, 274 C.A. 2d 737, 35 A.L.R. 3d 1433 (1969) which holds that proposed sterilization is a proper subject for declaratory judgment. *Smith v. Command*, 231 Mich. 409, 204 N.W. 140, (1925) judicially observes that a vasectomy is safe, simple and painless. That case also held it to be a medical fact that "feeble-mindedness" is hereditary. (The evidence in the trial court being that respondent's girl friends largely were retarded.) The opinion also weighs contending constitutional rights in favor of petitioner's position, as does *State v. Schaffer*, 126 Kan. 607, 270 P. 604, 605, (1928).

There is another ground for petitioner's requested relief. In recent years the so-called right of personal privacy has been asserted on the basis of the Federal Ninth and Four-

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teenth Amendments. It has been held to pertain to activities related to marriage: procreation, contraception, family relationships, child rearing and abortion (the last not necessarily related to marriage). It might be summarized by stating that certain personal and family activities are only the business of that person or family. This Court finally defined that right, in a dynamic way, in *Roe v. Wade*, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed 2d 147, 176, (1973).

Another powerful factor looms - overpopulation. See *Contraceptive Sterilization: The Doctor, The Patient and the United States Constitution*, 25 University of Florida Law Review, No. 2, p. 327.

A serious misconception of the mother's position was revealed by the child below-that of the role of the "state" in these proceedings. If the mother prevailed, the state would not have the right to enter the field and decree sterilization for its citizens, nor would there even be a state order for sterilization of the child in the case at bar. All that is sought, is that in one instance, a mother be judicially recognized as having the right to do what she believes is in the best interests of her child.

Also in the lower proceedings, the child quoted John Stuart Mill, *On Liberty*:

> "The only freedom that deserves the name is that of persuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it."

The child is speaking, of course, of his mother's claimed freedom to have him sterilized, and the converse of that, his claimed freedom not to be sterilized. Assume the child prevails and faces the world--fertile, mentally deficient and sexually agressive. What of the freedom of mentally deficient children he may impregnate? What of the freedom of their parents not to have their daughters impregnated and not to bear unwanted, illegitimate children? What of the freedom of the appellee's mother not to have illegitimate grandchildren which she, or the taxpayers, must support? What of the

freedom, of all of the rest of us, not to have more mentally deficient people to engage in anti-social and criminal conduct against us? To ask those questions is to answer them.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Indiana.

Respectfully submitted,

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APPENDIX A

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APPENDIX A

OPINION AND JUDGMENT OF THE
COURT OF APPEALS OF INDIANA
(Filed April 16, 1975, Billie R. McCullough,
Clerk of the Indiana Supreme and Court of Appeals)

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IN THE

COURT OF APPEALS OF INDIANA

THIRD DISTRICT

A.L., Plaintiff-Appellant	)	
vs.	)	No. 1-1273 A 213
G.R.H., Defendant-Appellee	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Morton W. Newman, Judge

GARRARD, J.

A. L. filed a complaint for declaratory judgment seeking declaration of her right under the common law attributes of the parent-child relationship to have her son, G.R.H., sterilized.

The boy, age fifteen, had suffered brain damage as the result of being struck by an automobile during his early childhood.

Expert testimony indicated that at the time of trial he had an IQ of 83. This was described as seven points below the normal range and in the "dull" or "borderline" area. Retarded ranges were assertedly below 70. It was stated that the boy had benefitted substantially from the special education program in which he was enrolled and that he appeared capable of further improvement. (His IQ two years before the action had tested at 65.) It was the opinion of the experts that he would be capable of earning his own livelihood either in specially supervised work or in entry-level jobs in the general marketplace.

His mental disability would not be transmittable to his offspring. In addition, he had exhibited no behavior from which a propensity to force his attentions on others might be inferred. It was the opinion of his psychiatrist that it was unlikely that G.R.H. would initiate antisocial activity, although his residual brain damage might render him more susceptible to being led into such activities. It was the expert's opinion that G.R.H. was sufficiently intelligent to understand what was involved in sterilization and to participate in the decision making process.

On the other hand, the evidence showed the boy had become interested in girls, that he wanted to date, and liked to kiss. Furthermore, it was shown that most of his female social contact was with other children from his special education classes. It is thus urged that if he impregnates a female, the great likelihood is that it will be one of these retarded or handicapped children.

The evidence at trial did not describe the proposed surgery, except to identify it as a vasectomy. However, from

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the positions taken by the parties, we are justified in assuming the operation would be simple, virtually painless and irreversible. It would leave G.R.H. unimpaired in his physical ability to have intercourse although he would be rendered permanently sterile.

The trial court denied the mother's right to secure the operation, and this appeal follows.

At the outset, we thank counsel for their excellent efforts in presenting a seriously concerned parent and in providing the Guardian ad litem defense of the child's interest.

In considering the facts at hand, it should be first noted that we are not dealing with a legislative enactment permitting sterilizations without consent where certain conditions exist.[1]

Secondly, the facts do not bring the case within the framework of those decisions holding either that the parents may consent on behalf of the child to medical services necessary for the child,[2] or where the state may intervene over the parents' wishes to rescue the child from parental neglect or to save its life.[3]

Permanent sterilization as here proposed is a different matter. Its desirability emanates not from any life saving necessities. Rather, its sole purpose is to prevent the capability of fathering children.

We believe the common law does not invest parents with such power over their children even though they sincerely believe the child's adulthood would benefit therefrom. This result has been reached most recently in *In Interest of*

[1] See, e.g. *Buck v. Bell* (1927), 274 U.S. 200; IC 1971, 16-13-13 - 16-13-16 (Burns Code Ed.) (Repealed, Acts 1974),

[2] *Weston v. Hospital of St. Vincent* (1921), 131 Va. 587, 107 S.E. 785

[3] See cases collected 30 A.L.R. 2d 1138.

M.K.R. (1974), Mo. , 515 S.W. 2d 467, and *In re Kemp's Estate* (1974), 118 Cal. Rptr. 64, where the courts of Missouri and California held that their respective juvenile statutes making general provision for the welfare of children were insufficient to confer jurisdiction to authorize the sterilization of retarded girls in the absence of specific sterilization legislation. See, also, *Wade v. Bethesda* (S.D. Ohio 1973), 356 F. Supp. 380; *Frazier v. Levi* (1969), Tex. Civ. App. , 440 S. W. 2d 393; *Holmes v. Powers* (1968), Ky. Dec. , 439 S.W. 2d 579.

The trial court correctly denied the requested relief. Affirmed.

STATON, P. J. and HOFFMAN, J. Concur.

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APPENDIX B

APPENDIX B

RULING OF INDIANA COURT OF APPEALS ON PETITION FOR REHEARING

IN THE COURT OF APPEALS OF INDIANA THIRD DISTRICT

A.L.,	)	
Plaintiff-Appellant	)	
	)	
vs.	)	NO. 1-1273 A 213
	)	
G.R.H.,	)	
Defendant-Appellee	)	

Appellant's Petition for Rehearing denied this 29th day of May, 1975.

ROBERTSON, C. J.

APPENDIX C

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APPENDIX C

RULING OF INDIANA SUPREME COURT ON PETITION TO TRANSFER

IN THE SUPREME COURT OF INDIANA

A.L.,	)	
Plaintiff-Appellant	)	
	)	Court of Appeals
vs.	)	
	)	NO. 1-1273 A 213
G.R.H.,	)	
Defendant-Appellee	)	

Appellant's (Mother) Petition to Transfer is hereby denied this 5th day of December, 1975.

GIVAN, C. J.
All Justices Concur